IN THE

Supreme Court of the United States

..... TERM, 1961

NO. 938

THOMAS N. GRIGGS

v.

COUNTY OF ALLEGHENY

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

WILLIAM A. BLAIR
DAVID B. FAWCETT
D. MALCOLM ANDERSON
Attorneys for Petitioner

1707 Henry W. Oliver Building
Pittsburgh, Pennsylvania

SMITH BROS. CO., INC., LAW PRINTERS, 434-438 BLVD. OF ALLIES, PITTSBURGH 19, PA.

INDEX

TABLE OF CITATIONS

IN THE

Supreme Court of the United States

..... TERM, 1961

NO. ....

THOMAS N. GRIGGS

v.

COUNTY OF ALLEGHENY

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Petitioner, Thomas N. Griggs, prays that a Writ of Certiorari issue to review the decision of the Supreme Court of Pennsylvania which reversed the Order of the Common Pleas Court (dismissing Exceptions to the Viewers' Report in Condemnation) with directions to vacate and set aside the Viewers' Report making an award of condemnation damages to Griggs and against the County of Allegheny.

OPINIONS OF THE COURTS BELOW

The majority and dissenting opinions of the Supreme Court of Pennsylvania are reported at 402 Pa. 411 and 420, respectively, and appear in the Appendix

page 27 and page 36. The opinions of the Court of Common Pleas of Allegheny County are reported at 108 P. L. J. 65 and they, together with the Report of the Board of Viewers (unreported) are included at pages 236a, 263a and 193a, respectively, of the Joint Record as printed for the Court below, nine copies of which Joint Record are filed herewith.

Also printed in the Appendix (page 52) is the opinion of the Supreme Court of Pennsylvania in the case of *Gardner v. County of Allegheny; Trans World Air Lines, Inc.; Eastern Air Lines, Inc.; Northwest Airlines, Inc., Capital Airlines; The Allegheny Airline; North American Coach Systems, Inc.; Lake Central Air Lines;* reported at 393 Pa. 120. Companion cases to the Gardner case were filed in Equity by Griggs and others. This litigation is discussed hereinafter.

JURISDICTION

The decision of the Pennsylvania Court sought to be reviewed was entered January 16, 1961. The Order denying Reargument was entered February 15, 1961.

The jurisdiction of your Honorable Court is invoked under Title 28 U. S. C., Section 1257 (2) and (3).

QUESTION INVOLVED

Is it a violation of due process of the Fourteenth Amendment and/or of the Fifth Amendment to the Constitution of the United States for the County of Allegheny, a Pennsylvania municipal corporation, to knowingly plan, construct, own and operate the Greater Pittsburgh Airport for public use so that the bottom

of the approach area (glide angle) necessary for the operation of the airport is within 12 feet of Petitioner's roof so that the resulting regular low flights of commercial planes over his property below the navigable airspace established by Congress endanger the life of Petitioner and others and destroy the use and enjoyment of his property where the County denies any liability to Petitioner therefor and the decision of the Pennsylvania Court ignores the Federal and Pennsylvania Constitutions and denies there is any taking of a superterranean easement on or property of Petitioner and expressly relegates Petitioner and all others similarly situated to the illusory and unconstitutional remedy of trespass actions against the owners and/or pilots of each aircraft using the glide path?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The applicable provisions of the Fifth and Fourteenth Amendments to the Federal Constitution and Article 16, Section 8, of the Pennsylvania Constitution are reproduced in the Appendix. The applicable provisions of Sections 402 and 403 of the Pennsylvania Act of 1933, 2 Purdon's Stat. Ann., Sections 1468 and 1469; and the Pennsylvania Act of 1945, 2 Purdon's Stat. Ann., Section 1563; and the applicable portion of the Civil Air Regulations, 14 C.F.R. Part 60, Section 60.17, and the applicable sections of the Federal Statutes under which the Regulations are promulgated, are all reproduced in the Appendix.

STATEMENT OF THE CASE

The case is concerned with the responsibility for the damage done to Petitioner's residence property by the necessary flights (below the navigable airspace) of commercial airplanes for take-off and landing at the County of Allegheny's Greater Pittsburgh Airport. The flights are performed in accordance with the air traffic regulatinons of the Civil Aeronautics Authority and pass over Petitioner's residence property so low below 500 feet that the effects are as Mr. Justice Bell, in the dissenting opinion of the Pennsylvania Supreme Court, said, at page 424 (App. 40):

> "I am convinced that the evidence demonstrates that there was a 'taking' of plaintiff's entire property."

The Viewers in condemnation found in their Report that by reason of these necessary flights there was a taking by the County of Allegheny of a superterranean easement over Petitioner's property effective 12:01 A.M., June 1, 1952, the date the County Commissioners, by Resolution, designated for the opening of the Airport for public use (and when in fact it opened). The Viewers made an award for the Petitioner against the County. (The Report of the Viewers appears at pages 193a to 207a of the Joint Record in the Pennsylvania Court.) The Viewers found, inter alia, that the bottom of the approach area to the Northeast-Southwest runway is 11.36 feet above the roof of Petitioner's residence (R. 200a).

We are not concerned with disputes of fact, not only because the case proceeded thereafter only upon exceptions raising questions of law, but also because the

County offered no testimony before the Viewers. The Court of Common Pleas of Allegheny County ultimately dismissed all exceptions thereby sustaining the Viewers' Report. (The opinions of that Court appear at R. 236a and R. 263a.)

The Pennsylvania Supreme Court, on appeal, while it rejected the County's contentions, pages 416, vacated the Viewers' Report and award and said that Petitioner's relief should be obtained from the owners or operators of the aircraft (page 419) (App. 35). (We note in passing that the suggested relief is illusory. See page 430 (App. 47) of the opinion of Mr. Justice Bell.)

The dissenting opinion of Mr. Justice Bell ably sets forth the applicable law, the constitutional rights of Petitioner and for the most part recounts the facts. It appears to us to be supererogation to do more than respectfully refer you to his opinion, but we must meet the requirement of the rules.

CONCISE STATEMENT OF FACTS

The County of Allegheny acquired the land (R. 46a) and constructed the Airport, its landing field, buildings and runways at a cost in excess of thirty million dollars.

Under the Federal Airport Act, the County received immense Federal subsidies for construction by entering into Agreements with the United States (R. 197a-198a) whereby, in summary, the County agreed to abide by the rules of the Civil Aeronautics Administration; to maintain a Master Plan of the Airport including the "approach areas"; and to acquire such easements or other interests in lands or airspace as may be necessary "to

meet the airport approach standards established by the Administrator" (R 197a-198a).

The County established such a Plan, approved by the Administrator, including the approach areas for the various runways (R 198a).

Petitioner's property consisted of about 19.161 acres, with a residence and other buildings thereon (R 199a) and is situate on a hill to the northeast of the Northeast-Southwest airport runway.

The approach area as shown by the Master Plan was over Petitioner's residence, certain other buildings and about 6.1 acres of his land (R 199a). The elevation of his residence door sill was about 34 feet above the elevation of the end of the Airport runway and the bottom of the approach area its (slope on a 40-1 gradient) is less than 12 feet above the residence roof (R 199a-200a). In common parlance this means the bottom of the glide or climb angle is 12 feet above Petitioner's roof.

Some of Petitioner's trees project into the glide angle (R 64a) and, in the event of engine failure on take-off there was no course but to plow into Petitioner's house (R 70a). Nevertheless, the County did not condemn or otherwise acquire an avigation easement over the Petitioner's property. (Nor did it do so over the properties in companion cases, although in one of them the residence projected into the approach area.) The County had power under Section 14 of the Pennsylvania Airport Zoning Act of 1945, 2 P. S. 1563, to condemn air avigation easements and other estates in property for the purpose of providing approach protection for aircraft.

Concise Statement of Facts.

The County opened the Airport for public use on June 1, 1952, commencing (R 200a) with 236 scheduled flights a day (R 111a). This Airport is used by all commercial scheduled flights serving Pittsburgh and vicinity.

From June 1, 1952, the Northeast-Southwest runway has been in regular operational use for landing and take-off of commercial and other aircraft in regular flight patterns at heights over Petitioner's residence varying from 30 to 300 feet on take-off and from 53 to 153 feet on let down (R 200a). The noise on take-off is comparable to that of a riveting machine or steam hammer and on let down to that of a noisy factory (R 213a).

Some of the effects upon the Petitioner and his household are summarized by Mr. Justice Bell, at page 422, (App. 38), as follows:

> "Regular and almost continuous daily flights, often several minutes apart, have been made by a number of airlines directly over and very, very close to plaintiff's residence. During these flights it was often impossible for people in the house to converse or to talk on the telephone. The plaintiff and the members of his household, (depending on the flight which in turn sometimes depended on the wind) were frequently unable to sleep even with ear plugs and sleeping pills; they would frequently be awakened by the flight and the noise of the planes; the windows of their home would frequently rattle and at times plaster fell down from the walls and ceilings; their health was affected and impaired, and they sometimes were compelled to sleep elsewhere. Moreover, their house was so close to the runways or path of glide that as the spokesman for the mem-

bers of the Airlines Pilot Association admitted "If we had engine failure we would have no course but to plow into your house." Moreover, the flights were endangered by plaintiff's trees and vice versa. The Viewers found, inter aila, that at the Griggs' propperty the surface of the approach area is only 11.86 feet above plaintiff's residence. There isn't the remotest doubt and the Viewers so found that these low flights produced exceptional noise, disturbance and vibrations, placed the plaintiff and the members of his household in fear and jeopardy of their safety or lives and substantially, materially and realistically interfered with the peaceful, quiet and legally justifiable enjoyment of their property."

(The Record references are R 41a; 42a; 43a; 56a; 60a; 73a; 80a; 82a; 83a; 93a; 102a.)

Petitioner rented places to get some sleep (R. 60a-61a) and finally was compelled to move from his residence (R 201a).

For many months after the opening of the Airport, the Petitioner had discussions with representatives of the County, the commercial airlines and others, all of whom disclaimed responsibility. The Petitioner and others, not having the facts, plans, engineering and other information, filed the companion cases in Equity (described in opinion, page 53) and finally filed his Petition for the appointment of Viewers, utilizing certain information secured from the answers of the County and the Airlines in the Equity cases (e. g. R 11a).

ARGUMENT

The decision of the Pennsylvania Court deprives Petitioner of his rights under the Fifth and Fourteenth Amendments to the Constitution (as well as under the Pennsylvania Constitution) in that his property or a superterranean easement thereon has been taken for public use without compensation therefor.

We reiterate that the undisputed facts plainly show the taking, injury and destruction of Petitioner's property and the dissenting opinion of Mr. Justice Bell ably summarizes the invasion of the rights of Petitioner; at p. 424 (App. 40):

> "We agree that the evidence clearly shows that there was a 'taking' of plaintiff's superterranean easement, and I am convinced that the evidence demonstrates that there was a 'taking' of plaintiff's entire property."

He further states, page 423 (App. 40):

> "It would be not only unfair but also unconstitutional to deny plaintiffs any recovery for the taking of either their land or an easement thereon. Article XVI, Section 8 of the Constitution of Pennsylvania provides:
>
> 'Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation *for property taken, injured or destroyed* by the construction or enlargement of their works, highways or improvements, which compensation shall be paid or secured before such taking, injury or destruction.' The Constitution of the United States,

Article V, similarly provides: '. . . nor shall private property be taken for public use, without just compensation.' "

It is plain that when Mr. Justice Bell inadvertently referred to Article V of the Federal Constitution, he meant the Fifth Amendment. It is unnecessary to cite cases to support the proposition that the Fourteenth Amendment to the Federal Constitution imposes the same restrictions upon States as the Fifth Amendment imposes upon Congress and the United States.

Your Honorable Court, in the case of *United States v. Causby,* 328 U. S. 256, decided that the flight of military planes landing at and taking off at an airport leased by the United States, constituted a taking within the Fifth Amendment for which the United States was liable. You said, pages 266, 267:

> "Flights over private land are not a taking, unless they are so low and frequent as to be a direct and immediate interference with the enjoyment and use of the land. We need not speculate on that phase of the present case. For the findings of fact of the Court of Claims plainly establish that there was a diminution in value of the property and that the frequent, low level flights were the direct and immediate cause. We agree with the Court of Claims that a servitude has been imposed upon the land."

Insofar as Petitioner knows, no other case involving taking by flights of aircraft has been before your Honorable Court, but the principles it established have been followed by the Federal Courts in many cases, including: *Highland Park, Inc. v. United States,* 161 F. Supp. 597; *Freeman v. United States,* 167 F. Supp. 541;

Cravens v. United States, 163 F. Supp. 309; *Adaman Mutual Water Company v. United States Court of Claims,* decided October 8, 1958; *Ralph Dick et al. v. United States,* 169 F. Supp. 491; *Hopkins v. United States,* 173 F. Supp. 245 (Advanced report—July 13, 1959); and *United States v. Ashcraft, et al.,* 176 F. Supp. 447.

The principle so established has been cited with approbation in many State cases, e. g., in *Dlugas v. United Air Lines,* 53 D. & C. 402 (Pa. District and County Report), the law is thus stated:

> "It may be observed in concluding . . . that the A.L. I. Restatement of the Law of Torts, Section 194, considers flights of aircraft over the lands of another to be privileged only if at a height so as not to interfere unreasonably with the possessor's enjoyment of the surface and the air space above it."

Under the authority of the Causby case, the Supreme Court of Washington, in the case of *Ackerman v. Port of Seattle,* 329 P.2d. 210, 348 P.2d. 664, decided that the Port of Seattle was liable for the taking of Ackerman's property by the necessary flights of commercial planes in landing and taking off at the Seattle airport. It is to be noted that the provisions of the Washington Constitution are identical to those of Pennsylvania, and both, of course, are similar to the applicable provisions of the Federal Constitution.

All the Justices of the Pennsylvania Court rejected the County's contention that the County was exempt from liability because the flights were in the navigable airspace and the flights were approved by the appropriate Federal Agency under the decision in the Causby case. See the majority opinion at page 416 (App. 32)

and the dissenting opinion at pages 426 et seq. (App. 43).

At the time of the taking in the instant case, the Civil Air Regulations (14 C. F. R. Parts 1-190) Section 60.17 Part 60 (Air Traffic Rules) establish minimum safe altitudes of flight at 1,000 feet over congested areas and 500 feet over other than congested areas. At the time of the Causby case the minimum prescribed by the Regulations for air carriers was 500 feet during the day and 1,000 feet during the night. In the Causby case, your Honorable Court ruled that flights below these minimums were not within the navigable airspace which Congress placed within the public domain and, in speaking of flights on the path of glide, said, at page 264:

> "Thus it is apparent that the path of glide is not the minimum safe altitude of flight within the meaning of the Statute. The Civil Aeronautics Authority has, of course, the power to prescribe navigable airspace only in terms of one of them—the minimum safe altitudes of flight."

The Pennsylvania Court properly held under the Causby case that the flights were not within the navigable airspace. The majority opinion, however, as said by Mr. Justice Bell, page 429 (App. 46): "clearly implies that the injury or taking was by the Airlines", and the majority of the Court then does a curious thing. The majority of the Court does not deny the injury or taking, but exculpates the County from liability, saying, page 419 (App. 35):

> "For Grigg's to make use of *United States v. Causby*, supra, as a precedent, it would seem that he should look for relief to the owners or operators

of the aircraft which have made the complained of flights through the air space above his land. Such relief is contemplated by Section 403 of the Aeronautical Code of May 25, 1933, P. L. 1011, 2 P.S. § 1469, which provides, in part, as follows: 'The owner and the pilot, or either of them, of every aircraft which is operated over the lands or waters of this Commonwealth, shall be liable for injuries or damage to persons or property on or over the land or water beneath, caused by the ascent, descent, or flight of aircraft, or the dropping or falling of any object therefrom, in accordance with the rules of law applicable to torts on land in this Commonwealth.' "

This is a plain evasion of the ruling in the Causby case that the flights constituted a taking for public use. The majority of the Court cannot contravene the facts of the taking so, in its zeal to exculpate the County of Allegheny, it places the liability upon the air carriers and pilots which have no power of eminent domain. In so doing, ignores the principle enunciated by Mr. Justice Bell, at page 429 (App. 46), as follows:

"Moreover, an airport is like a bridge, the County must provide, furnish and maintain suitable approaches and the owner of the airport or bridge must take sufficient land, and in cases of airports, air approaches, easements and air rights so that it will be safe for its users. Cf. *Penn Township v. Perry County,* 78 Pa. 458; *Knoll v. Harborcreek Township,* 86 Pa. Superior Ct. 423; *Beaver Borough v. Beaver Valley Railroad Company,* 217 Pa. 280, 66 A. 520; *Miller v. Beaver Falls,* supra; *United States v. Causby,* 328 U.S. 256; *Ackerman v. Port of Seattle,* 329 P. 2d 210, 348 P. 2d 664."

We add that there would be no occasion for the planes to fly on the glide angles across Petitioner's property if the County had not constructed the Greater Pittsburgh Airport and the NE-SW runway where it did. It is true, also, that the Airport cannot be used for the public purpose for which it was constructed unless the planes can land and take off there.

The curious reasoning of the majority opinion enables an evasion of any discussion of Petitioner's rights under the State and Federal Constitutions. To give verisimilitude of respect for law the Court suggests relief for damages may be obtained against the owners and operators of the aircraft and dusts off Section 403 of the Pennsylvania Act of 1933; 2 P. S. 1 39; adopted some thirteen years before the Pennsylvania Airport Zoning Act. This Section, we believe, by its plain terms, applies to injuries to persons or property by *trauma* from aircraft or object dropping therefrom. If the Section has the meaning suggested by the majority opinion, it is unconstitutional.

Moreover, Mr. Justice Bell ably points out at page 430 (App. 47) the suggested remedy is illusory and can give Petitioner no relief. It is not only impossible to record the facts as to the various flights of various airlines and the effects of these flights but it appears that legally the damage suffered by Petitioner never can be attributed or broken down among the individual flights. Neither the County nor the C. A. A. keeps any records as to the runway used by any flight or its height over Petitioner's property much less of the effect thereon. The recordings of the flight conversations in and out of the Airport are wiped out every thirtieth day (R 106a).

The suggested remedy, however, is not the point. The facts plainly show there was a taking for public use. Under our Constitution neither a State Court by its decision nor a State Legislature by its enactment can exculpate the governmental body from liability or compensation for property for public use by saying the liability is elsewhere. A muncipality cannot appropriate private property for a road or a bridge approach and be absolved of the liability because the State Court or the Legislature says that the owners and drivers of the automobiles who use the same are the parties liable.

Our position is ably summarized by Mr. Justice Bell at page 432 (App. 49):

> "If there could be any doubt as to the County's liability it would unquestionably be removed by (1) well settled principles of law and (2) by *United States v. Causby*, supra, and (3) by the agreement entered into between the United States and the County by which the County obtained enormous federal aid for the construction of this airport. In that agreement the County specifically undertook, inter alia, the following: '(i) insofar as is within its powers and reasonably possible, *the Sponsor will prevent the use of any land either within or outside the boundaries of the Airport in any manner* (including the construction, erection, alteration, or growth of any structure or other object thereon) *which would create a hazard to the landing, take-off or maneuvering of aircraft at the Airport, or otherwise limit the usefulness of the Airport. This objective will be accomplished* either by the adoption and enforcement of a Zoning Ordinance and reglations, *or by the acquisition of easements or*

other interests in land or airspace, or by both such methods.' "

"The duty and legal obligation to acquire land, buildings, easements and other interests in land and in air space which, unless acquired, would create a hazard to the landing, take-off, paths of glide, descent paths and authorized flights of aircraft, or otherwise limit the safety, usefulness and adequacy of the Airport, was clearly and unquestionably *by the terms of this contract* that of the County of Allegheny. It follows that the County is liable to the plaintiff (1) under and by virtue of the well and long settled Common Law principle of sic utere tuo ut alienum non laedas, and (2) under the *United States v. Causby* case, and (3) by reason of the aforesaid contract which the County made and entered into with the United States of America."

The State Court has plainly and improperly deprived Petitioner of his constitutional rights under both the State and Federal Constitutions.

CONSTITUTIONAL ISSUES AS RAISED IN THE STATE PROCEEDINGS

In the entire Equity litigation (see Appendix A, page 53), the decision in the case of the *United States v. Causby*, 328 U.S. 258, was argued before the Court of Common Pleas of Allegheny County more than six times and discussed in briefs before the Supreme Court of Pennsylvania at least four times with oral arguments on at least three occasions. In the instant condemnation case, the whole matter was argued again before the Court of Common Pleas (R. 248a) and again before the Supreme Court of Pennsylvania as appears by the dissenting opinion of that Court. The constitutional matters as well as the lack of constitutionality of the decision of the majority of the Court and of the Pennsylvania Act of 1933 were again presented in the Petition for Reargument.

REASONS FOR GRANTING THE WRIT

I. The case is of extreme national importance. The decisions of the highest Courts of the two States which have decided the question are in direct conflict. While we believe the Causby case rules the matter, the Pennsylvania decision and the Washington decision (Ackerman v. Port of Seattle, supra) have reached opposite conclusions with respect to municipal liability for a taking by commercial flights landing and taking off at a municipal airport. The constitutional provisions of both States are identical and both are similar to the Fifth Amendment of the Federal Constitution. Insofar as Petitioner knows, your Honorable Court has decided no cases, other than the Causby case, with respect to the taking of property by the flight of planes. The Causby case involved the flight of military planes from an airport leased by the United States for use in common with others.

Condemnation proceedings are under State law and other actions by municipal authorities rarely meet the jurisdictional requirements of the Federal District Courts. Municipal airports and the problems arising therefrom are of concern in every State and in many of the municipalities if not all of them.

The Pennsylvania decision gives rise to the following questions, inter alia: What are the obligations of municipalities to condemn avigation easements where safety requires them or where the flights constitute a taking of private property? Are pilots and/or owners of aircraft liable for damages if they land or take off at public airports? What are the rights of property owners

whose property is taken, injured or destroyed by such flights? Is their remedy to enjoin the flights, thus stopping the public use and interrupting interstate commerce? (Injunction has been been used in some cases.)

The Pennsylvania decision will be cited in State Courts throughout the country. It will be a long time before other State cases get to your Honorable Court for review.

What is the real solution in the public interest? Even if it be constitutionally possible to hold the owners and pilots of aircraft in interstate flights liable for damages, the remedy is illusory. The remedy by injunction is not a solution because by the time an injunction action is brought, the public investment is already in the airport. The real solution is to place the liability upon the municipalities who build the airports, thus applying the principles enunciated in the Causby case. The cost of the easements is a small addition to the airport cost, all of which is passed on by landing fees and rental charges to the airlines and by them in turn to the traveling public in the form of fares.

This is the proper solution to balance the constitutional rights of property owners with the public interest. As Mr. Justice Bell said, page 425, "In our desire for progress we must not overlook or extinguish the inherent and inalienable constitutionally guaranteed rights of private property which is one of the bedrocks of our Federal and State Governments, and indeed one of the two great hallmarks of western civilization.".

The reversal of the decision of the Pennsylvania Court does not mean that all properties under the glide

angle are taken, injured or destroyed. The correct rule is as stated in the Causby case at page 266: "Flights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land.".

In the Causby case the low glide angle flights passed over the property at a height of 83 feet. In the instant case at the height of 30 feet above Petitioner's roof. In the Causby case the flights were of military planes of the types and power in existence in 1942. In the instant case the flights are made by commercial aircraft of the type and size still in use, including Constellations.

II. The Pennsylvania Court decided the Federal question of substance contrary to the applicable decision of your Honorable Court in the Causby case.

In the Causby case, your Honorable Court decided that the flight of planes on the glide angle constituted a taking of Causby's property by the United States for which taking he was entitled to compensation under the Fifth Amendment. The plain gist of the decision was that there was a taking for public use.

It is true that in the opinion you said, page 264, "As we have said, the flight of airplanes which skim the surface but do not touch it, is as much an appropriation of the land as a more conventional entry upon it. We would not doubt that if the United States erected an elevated railway over respondent's property at the precise altitude where its planes now fly, there would be a partial taking, even though none of the supports of the structure rested on the land.".

The Pennsylvania Court followed the Causby decision in holding that the glide angle flights were not within the navigable airspace but it ignored completely that the plain intent of the Causby decision was that the flight of the planes in and out of the airport constituted a taking for public use.

The Pennsylvania Court, in order to evade any discussion of Petitioner's constitutional rights, completely ignored the decision in the Causby case that there was a taking for public use and placed the responsibility for the taking of Petitioner's property upon the commercial airlines which have no power of condemnation and cannot lawfully take nor appropriate property. The Pennsylvania Court chose to ignore not only the heart of the Causby decision but also the inherent facts that the approach areas to the runways of the Airport are as much a part of the public improvement as the runways themselves. There would be no occasion for glide angle flights over Petitioner's property with the resulting effects thereto if the County of Allegheny had not built the Airport and its Northeast-Southwest runway where it did just as in the Causby case there would have been no occasion for the flight of the military planes over the Causby property if the United States had not chosen to lease and operate the airport where it did.

III. The decision of the Pennsylvania Court encourages placing in jeopardy the safety of pilots, the traveling public, and property owners. Mr. Justice Bell in the dissenting opinion of the Pennsylvania Court states at page 422:

> "Moreover, their house was so close to the runways of path of glide, that, as the spokesman for

the members of the Airlines Pilot Association admitted, 'If we had engine failure we would have no course but to plow into your house.'. Moreover, the flights were endangered by Plaintiff's trees and vice versa. The Viewers found, inter alia, that at the Griggs' property the surface of the approach area is only 11.86 feet above Plaintiff's residence."

In one of the companion cases a substantial portion of the plaintiff's house as well as his trees projected into the approach area or path of glide.

The County of Allegheny, under the provisions of the Airport Zoning Act of April 17, 1945, P. L. 237, 2 P. S. 1653, had the power to condemn air avigation easements and other estates and property for the purpose of providing approach protection for aircraft and the County was obligated by its agreements with the United States to provide such protection.

In speaking of the County of Allegheny, Mr. Justice Bell said in the dissenting opinion at page 423:

> "It clearly failed to acquire by eminent domain or otherwise sufficient land and air rights to protect plaintiff's property and his safety and life, and the safety and lives of his family."

and further at page 429:

> ". . . the County must provide, . . . in cases of airports, air approaches, easements and air rights so that it will be safe for its users."

The Pennsylvania decision encourages municipalities to avoid taking land or easements beyond the perimeter of the airport regardless of the hazards to pilots, the traveling public and property owners.

IV. The case is of extreme importance not only to the Petitioner and the plaintiffs in the companion cases but to all parties in Pennsylvania and elsewhere similarly situated, as the Pennsylvania decision deprives them of their rights under both State and Federal constitutions.

It is unnecessary we think to further discuss this reason except to state that the properties of the companion cases are situate near the East-West runway as well as the Northeast-Southwest runway; some are more valuable than Petitioner's property; and on one of them the residence substantially projects into the glide angle. In Petitioner's case, the majority of the Court dismissed as moot, his appeal that the Viewers, in fixing the award rejected the undisputed testimony of the expert of whom the lower court said (R. 262a)

> "The Viewers heard . . . plaintiff's expert. . . . individually cognizant of his excellent reputation as a citizen and exceptional qualifications. His opinion was neither impeached nor contradicted."

The View of the Viewers was made January 26, 1959.

V. The Pennsylvania decision should be reversed to affirm that the established principle that municipal improvements cannot be made in disregard of the constitutional rights of private property owners is applicable as well to municipally owned airports.

No one can read the facts in the opinions in the litigation without reaching the conclusion that the County of Allegheny, having operated the old airport and laid out the new one, with full knowledge of the

facts, determined to ride roughshod over the constitutional rights of the airport neighbors.

For many months after the opening of the Airport the County and the Airlines refused to do anything about the situation and the Petitioner and others, knowing nothing of the aviation matters since developed such as approach areas, gradients, surveys, glide angles, etc., but suffering unjustly from the effects imposed upon them and their properties, filed companion suits in Equity stating that the flights were either a trespass or there was a taking of their properties and asking for compensation or injunction. The County, instead of facing the matter, asserted through the Pennsylvania Courts the very contention overruled in the Causby case resulting in the plethora of litigation reported under the caption Gardner et al. tabulated in the Appendix. This foisted the situation upon the Pennsylvania Courts recounted in the opinions. These Courts did not grapple with the heart of the matter and the effect of the whole litigation is a denial of due process in itself.

The Equity litigation resulted in only one thing of any substance. Eventually the County and the Airlines were forced to admit in their pleadings that the flights over Petitioner's property were below 500 feet, which admissions made possible the commencement of the proceedings in condemnation.

In the proceeding before the Viewers, the County's position was that the entire burden was upon the Petitioner (R. 23a) (R. 129a) and when called upon refused to produce its evidence of altitudes of flight and studies of sound, knowing full well it had none. The County did not believe Petitioner could prove his case.

The point of the whole thing is that no municipality should knowingly be permitted to invade the constitutional rights of property owners and force upon them the necessity to obtain the technical understanding of avigation complexities, altitudes of flights, and the proof of all the other matters necessary to make out a case. The municipality, as part of planning the airport, should be required to make the necessary studies. The City of Philadelphia acquired necessary avigation easements. Studies in sound were made which led to the abandonment of the proposed site for the Detroit Airport.

Improper planning of public improvement should not require either that citizens must resort to injunction to protect their constitutional rights. Such procedure throws them unfairly into conflict with the municipality, air transportation, interstate commerce and the public.

We reiterate that the majority of the Supreme Court of Pennsylvania made up its mind it would absolve the County and then support that conclusion with the specious reason which deprived the Petitioner and the others of their constitutional rights and left them with no remedy whatsoever.

CONCLUSION

The decision below is in conflict with the Constitution of the United States and the Constitution of Pennsylvania and, further, in conflict with the decision of your Honorable Court in the case of United States v. Causby, The Supreme Court of Washington in *Ackerman v. Port of Seattle,* and presents a question of national importance. Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

WILLIAM A. BLAIR
DAVID B. FAWCETT
D. MALCOLM ANDERSON
Counsel for Petitioner

APPENDIX A

GRIGGS v. ALLEGHENY COUNTY
402 Pa. 411

Before JONES, C. J., BELL, MUSMANNO, COHEN, BOK and EAGEN, JJ.

Appeals, Nos. 155 and 158, March T., 1960, from orders of Court of Common Pleas of Allegheny County, July T., 1958, No. 2384, in case of Thomas N. Griggs v. County of Allegheny. Order in appeal No. 155 reversed with directions; appeal No. 158 dismissed; reargument refused February 15, 1961.

Proceedings on exceptions to report of board of viewers awarding damages.

Opinion filed dismissing county's exceptions and orders entered, opinion by SOFFEL, J. Supplemental opinion filed dismissing plaintiff's exceptions and order entered, opinion per curiam. Plaintiff and county, respectively, appealed.

Opinion

By MR. CHIEF JUSTICE JONES, January 16, 1961:

These appeals grow out of a viewers' proceeding instituted by the plaintiff as owner of land neighboring the Greater Pittsburgh Airport to recover damages from the County of Allegheny, the owner and operator of the airport, for an alleged appropriation of the plaintiff's land because of a substantial interference with the use and enjoyment of it caused by flights of aircraft at low altitudes, through the air space above the land, when taking off or landing at the airport.

The Greater Pittsburgh Airport was opened for commercial air travel on June 1, 1952. At that time, Thomas N. Griggs, the plaintiff, was the owner of a nearby tract of land containing 19.161 acres improved with a house, two cottages, a four-car garage with living apartment overhead, and certain outbuildings. Part of the Griggs property lay under an "approach area" for the airport's northeast-southwest runway.

On May 29, 1958, Griggs petitioned the Court of Common Pleas of Allegheny County for the appointment of viewers to assess the damages caused by an alleged taking of his land by the County of Allegheny on June 1, 1952. The petitioner averred that, since the opening of the airport for commercial use, aircraft of several air lines, upon taking off and landing at the airport, have frequently and continuously flown through the air space above his land at an elevation of less than 500 feet; that as the result of such flights, "the use and enjoyment of [his] property have been interfered with by reason of the possible danger of the low flights, the noise and vibrations which they cause, their lights pointing at the premises at night time and interference with sleep and rest"; and that the property has been thereby "greatly damaged and depreciated in value."

The Court appointed a board of view which sat for the purpose of its appointment, heard testimony offered by the claimant, and awarded him damages in the sum of $12,690. Griggs filed exceptions to the viewers' report alleging that the viewers had unlawfully disregarded the expert testimony adduced by him as to the damages to his property which was the only testimony

offered before the viewers on that issue. He also appealed the award to the Court of Common Pleas of Allegheny County where the question of damages would be heard de novo. The county, contending that it was not liable for any damage allegedly suffered by the claimant, offered no testimony before the board of viewers on the issue of property value. The county filed exceptions to the viewers' award to Griggs setting forth therein that, based upon the viewers' findings of fact, there was no taking of Griggs' property *by the County*. The court below dismissed all exceptions of both parties from which action each of the parties took an appeal to this court pursuant to Section 2623 of the Second Class County Code of July 28, 1953, P. L. 723, 16 PS § 5623.

It is clear that a property owner may petition the court for the appointment of viewers to assess and award damages against an entity clothed with the power of eminent domain where such entity effects a "taking" of the petitioner's property whether or not the appropriator has followed the statutorily provided condemnation procedure. *Rosenblatt v. Pennsylvania Turnpike Commission*, 398 Pa. 111, 126-127, 157 A. 2d 182; *Philadelphia Parkway*, 250 Pa. 257, 264-265, 95 Atl. 429; *Barron's Use v. United Railway Co.*, 93 Pa. Superior Ct. 555, 557-558. A "taking" occurs when the entity clothed with the power of eminent domain substantially deprives an owner of the beneficial use and enjoyment of his property. *Miller v. Beaver Falls*, 368 Pa. 189, 196-197, 82 A. 2d 34; *Creasy v. Stevens*, 160 F. Supp. 404, 410-412.

Paragraph 12 of Griggs' petition for the appointment of viewers admits that the county has not con-

demned his land by way of the statutorily authorized procedure.[1]

What the claimant attempted to show at the hearing before the viewers was that the county had substantially deprived him of the beneficial use and enjoyment of his property. Assuming, for the present purposes, that he has shown a substantial deprivation of the beneficial use and enjoyment of his property, we shall proceed at once to a consideration of the basic question raised by the county's appeal as to whether such deprivation was, as a matter of law, caused by the County of Allegheny.

The county, relying on findings of fact by the viewers that no flights of aircraft were shown to be in violation of any regulation of the Civil Aeronautics Administration and that no flights were shown to be lower than necessary for a safe landing or take-off, contends that all of the complained of flights were through air space which the United States Congress placed within the public domain and that, therefore, any taking of Griggs' property was by the federal government and not by the County of Allegheny.

Section 10 of the Air Commerce Act of May 20, 1926, 44 Stat. 568, as amended, 49 U.S.C.A., §180, provides as follows: "As used in this Act, the term "navigable airspace, means airspace above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Authority, and such navigable airspace shall be subject

---

1. Section 14 of the Airport Zoning Act of April 17, 1945, P. L. 237, 2 PS §1563, confers upon political subdivisions the power to condemn air avigation easements and other estates in property for the purpose of providing protection for aircraft.

to a public right of freedom of interstate and foreign air navigation in conformity with the requirement of said sections."

Section 3 of the Civil Aeronautics Act of June 23, 1938, 52 Stat. 973, 49 U.S.C.A., § 403, states that "There is recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit in air commerce through the *navigable air space* of the United States." (Emphasis supplied)

Section 1 (24) of the Act, 49 U.S.C.A., §401 (24), defines "navigable air space" as follows: " 'Navigable air space' means air space above the minimum altitudes of flight prescribed by regulations issued under this Act.

Pursuant to authority granted by the Civil Aeronautics Act of 1938, the Civil Aeronautics Board issued Civil Air Regulations (14 C.F.R., Parts 1-190). Among these Regulations, Section 60.17, Part 60 (Air Traffic Rules), which establishes minimum safe altitudes of flight at 1000 feet over congested areas and 500 feet over other than congested areas, is prefaced with the following: "Except when necessary for taking off or landing, no person shall operate an aircraft below the following altitudes." The County of Allegheny contends that this exception means that minimum safe altitudes of flight for take-offs and landings have been established at the heights necessary for these purposes.[2] The county concludes, therefore, that the "navigable air space" which Congress placed within the public domain includes all air space needed by an airplane for take-off or landing.

---

2. This is now the position of the Civil Aeronautics Board. Civil Air Regulations, Interpretation 1, 19 F.R. 4602, July 27, 1954.

While the conclusion has the rationale of reality to support it, we are precluded from adopting it by the Supreme Court's interpretation of similar regulations in *United States v. Causby*, 328 U. S. 256 (1946). The decision in that case upheld the claimant's right to damages from the United States for a taking of certain of his property located near an airport because of a substantial interference with his use and enjoyment of it by low flights of U. S. military planes, when taking off from or landing at the airport. In answer to an argument similar to that which the County of Allegheny makes here, the Supreme Court said (at pp. 263-264), "The fact that the path of glide taken by the planes was approved by the Civil Aeronautics Authority does not change the result. The navigable airspace which Congress has placed in the public domain is 'airspace above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Authority.' 49 U.S.C.A., sec. 180. If that agency prescribed 83 feet [the height at which the planes passed over Causby's land] as the minimum safe altitude, then we would have presented the question of the validity of the regulation. But nothing of the sort has been done. The path of glide governs the method of operating—of landing or taking off. The altitude required for that operation is not the minimum safe altitude of flight which is the downward reach of the navigable airspace. The minimum prescribed by the Authority is 500 feet during the day and 1,000 feet at night for air carriers (Civil Air Regulations, Pt. 61, sections 61.7400, 61.7401, Code Fed. Reg. Cum. Supp., Tit. 14, ch. 1), and from 300 feet to 1,000 feet for other aircraft, depending on the type of plane and the character of the terrain Id. Pt. 60, sections 60.350-60.3505, Fed. Reg. Cum. Supp., supra.

Hence, the flights in question were not within the navigable airspace which Congress placed within the public domain. If any airspace needed for landing or taking off were included, flights which were so close to the land as to render it uninhabitable would be immune. But the United States concedes, as we have said, that in that event there would be a taking. Thus, it is apparent that the path of glide is not the minimum safe altitude of flight within the meaning of the statute. The Civil Aeronautics Authority has, of course, the power to prescribe air traffic rules. But Congress has defined navigable airspace only in terms of one of them—the minimum safe altitudes of flight."[3]

Thus, the Supreme Court has held that the navigable air space which Congress placed in the public domain does not include the path of glide for an airplane's take-off or landing. As we are, of course, bound by the Supreme Court's interpretation of the federal statutes involved, we are, perforce, required to reject the County's contention that navigable air space, as employed by Congress, includes the area necessary for an airplane's take-off or landing in safety.[4]

---

3. The Supreme Court of Washington recently rejected the identical argument, based upon Section 60.17, Part 60, of the Civil Air Regulations, that the County of Allegheny is now pressing upon us, quoting this paragraph from *United States v. Causby, supra. Ackerman v. Port of Seattle,* 348 P. 2d 664 (1960).

4. Congress moved to counteract the effect of the decision in United States v. Causby, by enacting the Federal Aviation Act of August 23, 1958, Pub. L. 85-726, 72 Stat. 731, 49 U.S.C.A., §1301 et seq., Section 1401(b) whereof repealed the Civil Aeronautics Act of 1938. Section 104 of the later Act, 49 U.S.C.A., §1304, provides

But, even though the complained of flights were not through air space which was part of the public domain, the record does not show that the County of Allegheny was the efficient legal cause of any damage resulting from the flights. Griggs testified at the hearing before the viewers that the airplanes of several commercial air lines flew over his land at low altitudes. But, he offered no proof that any of these planes were owned by the County of Allegheny or operated by its agents. Indeed, the viewers found as a fact that "There is no evidence of any control exercised over any aircraft by the County of Allegheny." That finding, supported as it is by the record precludes the claimant from recovering against the County in this proceeding.

In unwarrantedly awarding damages to Griggs, the viewers relied upon a finding of fact that the County, in compliance with rules and regulations of the Civil Aeronautics Authority, drafted a "Master Plan," showing an "approach area" over part of Griggs' property, which plan was submitted to and approved by the Civil Aeronautics Authority. But the drafting, submission, and approval of the plan did not give the County an easement of avigation over Griggs' property, nor was any evidence offered to show that such action deprived

---

that, "There is recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit through the navigable airspace of the United States." And, Section 101 (24), 49 U.S.C.A., §1301(24), declares that (as used in the Act), " 'Navigable airspace' means airspace above the minimum altitudes of flight prescribed by regulations issued under this chapter, *and shall include airspace needed to insure safety in take-off and landing of aircraft.*" (Emphasis supplied.)

Griggs of any use and enjoyment of his property, substantially or otherwise.

It is true that in *United States v. Causby,* supra, the United States was held to have effected a taking of certain property neighboring an airport. But there the United States owned and its agents operated the aircraft which caused the deprivation of the owner's use and enjoyment of the neighboring property. The airport itself was owned by the Greensboro-High Point Municipal Authority, which had leased to the United States Government the right to use the field "concurrently, jointly, and in common" with other users. The Supreme Court in the *Causby* opinion did not indicate who actually maintained and operated the airport, evidently considering this point irrelevant.

For Griggs to make use of *United States v. Causby,* supra, as a precedent, it would seem that he should look for relief to the owners or operators of the aircraft which have made the complained of flights through the air space above his land. Such relief is contemplated by Section 403 of the Aeronautical Code of May 25, 1933, P. L. 1001, 2 P.S. §1469, which provides, in part, as follows: "The owner and the pilot, or either of them, of every aircraft which is operated over the lands or waters of this Commonwealth, shall be liable for damages to persons or property on or over the land or water beneath, caused by the ascent, descent, or flight of aircraft, or the dropping or falling of any object therefrom, in accordance with the rules of law applicable to torts on land in this Commonwealth."

Commercial air lines are not, of course, clothed with the power of eminent domain and cannot, therefore, be

proceeded against by a complaining land owner through a viewers' proceeding for the assessment of damages for a taking of his property.

In view of our conclusion herein that there has been no taking of the plaintiff's property by the County of Allegheny in the particulars complained of, and that, consequently, the County is not liable to the plaintiff for any deprivation of the use and enjoyment of his property by airplanes utilizing the Greater Pittsburgh Airport, the question raised by the plaintiff's appeal has become moot.

The order dismissing the County's exceptions to the viewers' report on appeal at No. 155 is reversed with directions that the viewers' report be vacated and set aside.

Plaintiff's appeal at No. 158 is dismissed.

DISSENTING OPINION BY MR. JUSTICE BELL:

In *Gardner v. Allegheny County*, 328 Pa. 88, 114 A. 2d 491, the Court analyzed and reviewed at length a number of the problems arising out of flight of aircraft over privately owned lands and held inter alia (page 116): first, "It is clear as crystal under the authority of United States v. Causby [328 U. S. 256] that flights over private land which are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land amount to a 'taking.'" And secondly, that a Court of Equity has no power or jurisdiction to assess damages for a taking, but damages for property taken, injured or destroyed lies in proceedings before the Board of View. In that decision we did not decide who

were proper defendants. The plaintiff, relying on the *Gardner* case, brought proceedings before the Board of View and proved that the flights were so low and so frequent as to be a direct and immediate interference with the enjoyment and use of his land and hence amounted to a taking for which he was entitled to recover damages in eminent domain proceedings before the Board of View.

The Viewers found, inter alia, that "The 'taking' of the superterranean easement over the property of Griggs became effective on June 1, 1952, at 12:01 A.M., by virtue of the Resolution of the Commissioners of Allegheny County dated May 27, 1952, designating that date and hour as the time for the opening of the Greater Pittsburgh Airport for public user. Consequently, the right to damages accrued at that time.

"The damages allowed by the Viewers have been measured by the usual procedure of deducting the after value from the value of the property as a whole immediately before and unaffected by the public improvement, to which has been added 6% per annum interest as detention money from the date of opening the Airport. We have found that the highest and best use of the property was as a country estate. We determine the "after" diminished value of the property as being directly and immediately caused by frequent low flying to and from the Airport, inevitably producing noise, vibration, fear of disaster, anxiety and general interference with the peaceful and quiet enjoyment of the property by the owner, resulting in damages to the extent of $12,690."

Defendant appealed because it believed it had no liability. Plaintiff appealed because he believed the

award of damages was inadequate. The two basic questions involved are (1) whether the County of Allegheny had any liability for the damages which plaintiff unquestionably suffered and (2) if so, what was the date of the taking and subsidiarily were the damages inadequate?

The County of Allegheny acquired the Greater Pittsburgh Airport and all the land included in and/or surrounding the airport, as well as air rights and/or easements by eminent domain, pursuant to the Act of May 2, 1929, P. L. 1278. The Airport was opened for commercial flights on July 1, 1952. The County not only owned the Airport, but it also constructed the buildings thereon and the landing fields and the runways to the airport. It also owed a duty to repair and maintain them. It leased the land and facilities for commercial flights, to various airlines. Furthermore, the County knew that the approach and the path of glide or the descent path and the airlines themselves were in minute detail regulated, prescribed and directed how, when and where to fly, how, when and where to approach, and land and take off, by independent Governmental Agencies known as the Federal Aviation Agency and the Civil Aeronautics Board.

Regular and almost continuous daily flights, often several minutes apart, have been made by a number of airlines directly over and very, very close to plaintiff's residence. During these flights it was often impossible for people in the house to converse or to talk on the telephone. The plaintiff and the members of his household, (depending on the flight which in turn sometimes depended on the wind) were frequently unable to sleep even with ear plugs and sleeping pills; they would fre-

quently get awakened by the flight and the noise of the planes; the windows of their home would frequently rattle and at times plaster fell down from the walls and ceilings; their health was affected and impaired, and they sometimes were compelled to sleep elsewhere. Moreover, their house was so close to the runways or path of glide that as the spokesman for the members of the Airlines Pilot Association admitted "If we had engine failure we would have no course but to plow into your house." Moreover, the flights were endangered by plaintiff's trees and vice versa. The Viewers found, inter alia, that at the Griggs' property the surface of the approach area is only 11.86 feet above plaintiff's residence. There isn't the remotest doubt and the Viewers so found that these low flights produced exceptional noise, disturbance and vibrations, placed the plaintiff and the members of his household in fear and jeopardy of their safety or lives and substantially, materially and realistically interfered with the peaceful, quiet and legally justifiable enjoyment of their property.

There are four possible solutions: (1) No recovery—damnum absque injuria, like cases where property owners along a railroad track cannot recover for the noise and smoke which inconveniences and upsets them. (2) The United States is liable because (a) it furnished funds to the County of Allegheny to help pay for the acquisition and construction of this airport, and (b) it approved by a contract the County's acquisition of and its master plan for this airport, and (c) it regulates and minutely orders and directs through the Civil Aeronautics Board the take-offs and landings and path of glide of all planes entering and leaving the airport. (3) The airlines which fly some or many of the flights which injure plaintiff's

property and interfere with or jeopardize its existence and the safety of plaintiff and others lawfully thereon. (4) The County of Allegheny which acquired by eminent domain the ownership of the property and constructed the airport, the buildings, the approaches and runways, all of which it must maintain at its expense, leases and (to some extent) operates the airport. It clearly failed to acquire by eminent domain or otherwise sufficient land and air rights to protect plaintiff's property and his safety and life, and the safety and lives of his family.

It would be not only unfair but also unconstitutional to deny plaintiffs any recovery for the taking of either their land or an easement thereon. Article XVI, § 8 of the Constitution of Pennsylvania provides: "Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation *for property taken, injured** or destroyed by the construction or enlargement of their works, highways or improvements, which compensation shall be paid or secured before such taking, injury or destruction." The Constitution of the United States, Aritcle V, similarly provides: ". . . nor shall private property be taken for public use, without just compensation."

We agree that the evidence clearly shows that there was a "taking" of plaintiff's superterranean easement, and I am convinced that the evidence demonstrates that there was a "taking" of plaintiff's entire property.

In *Miller v. Beaver Falls,* 368 Pa. 189, 82 A. 2d 34, the Court said (pages 196-197): ". . . 'The law as to what

---

* Italics throughout, ours.

constitutes a taking has been undergoing a radical change during the last few years. Formerly it was limited to the actual physical appropriation of the property or a divesting of title, but now the rule adopted in many jurisdictions and supported by the better reasoning is that *when a person is deprived of any of certain rights in and appurtenant to tangible things, he is to that extent deprived of his property,* and his property may be taken, in the constitutional sense, though his title and possession remain undisturbed . . . "and it may be laid down as a general proposition, based upon the nature of property itself, that, *whenever the lawful rights of an individual to the possession, use or enjoyment of his land are in any degree abridged or destroyed by reason of the exercise of the power of eminent domain, his property is, pro tanto, taken, and he is entitled to compensation*" ' [Cheves v. Whitehead, 1 F. Supp. 321]: 11 McQuillin, Municipal Corporations (3rd ed.) §32.26, p. 312. As the Court of Appeals of New York, in Foster v. Scott, 136 N.Y. 577, 32 N.E. 976, . . . so aptly said (page 584): '. . . All that is beneficial in property arises from its use and the fruits of that use, and whatever deprives a person of them deprives him of all that is desirable or valuable in the title and possession . . .'

". . . [As] Mr. Justice, later Chief Justice SCHAFFER, in his opinion, after calling attention to the provisions of the Constitution of Pennsylvania, said (page 490): 'The governing principle is accurately stated in 20 Corpus Juris, 566, "There need not be an actual, physical taking, but any destruction, restriction or interruption of the common and necessary use and enjoyment of property in a lawful manner may constitute a taking

for which compensation must be made to the owner of the property" ' "

Airlines and airports are of modern origin. The problems which have arisen in connection with airports and aircraft and air travel were unknown to the Common Law and in reality arose for the first time in the 1920's, or thereafter. Until the opening of the air age the owner of real property owned from the surface (or below) to the sky—cujus est solum ejus est usque ad coelum. That principle has been very substantially modified. It is now held that the owner of land owns from the surface (or lower regions to the upper reaches and regions of the air to whatever heights may be needed for use and enjoyment of his property. In considering the problems created by the air age, we are faced with the task of reconciling traditional common law concepts with the realities of modern day life. In our desire for progress we must not overlook or extinguish the inherent and inalienable constitutionally guaranteed rights of private property which is one of the bedrocks of our Federal and State Governments, and indeed one of the two great hallmarks of western civilization. We must not allow, in the appealing name of progress or general welfare, a property owner to be deprived by the Federal, State or County Government, or by anyone, of his property or any rights accruing therein and therefrom.

As Mr. Justice HOLMES said in his opinion in *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415-416, 43 S. Ct. 158 (in which he declared the Kohler Act of May 27, 1921, P. L. 1198 unconstitutional): "The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall

not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. *Hairston v. Danville & Western Ry. Co.*, 208 U.S. 598, 605. When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.

"The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking . . . We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change . . ."

The contention that the County is exempt from liability (a) because the air space is a few feet above plaintiff's property and within the public domain, and (b) whatever injury or damage was caused was caused by the airlines, and (c) because the appropriate Federal Agency authorized the flights, is without merit. The United States Supreme Court in *United States v. Causby*, 328 U.S. 256, has rejected these contentions. There, the Court, speaking through Mr. Justice DOUGLAS, pertinently said (pages 263-265): "The fact that the path of glide taken by the planes was that approved by the Civil Aeronautics Authority does not change the result. The navigable airspace which Congress has placed in the public domain is 'airspace above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Au-

thority.' 49 U.S.C., §180. If that agency prescribed 83 feet as the minimum safe altitude, then we could have presented the question of the validity of the regulation. But nothing of the sort has been done. *The path of glide governs the method* of operating—*of landing or taking* off. *The altitude required for that operation is not the minimum safe altitude of flight which is the downward reach of the navigable airspace.* The minimum prescribed by the Authority is 500 feet during the day and 1,000 feet at night for air carriers (Civil Air Regulations, Pt. 61, §§61.7400, 61.7401, Code Fed. Reg. Cum. Supp., Tit. 14, ch. 1), and from 300 feet to 1,000 feet for other aircraft, depending on the type of plane and the character of the terrain Id., Pt. 60, §§60.350-60.3505, Fed. Reg. Cum. Supp., supra. Hence, the flights in question were not within the navigable airspace which Congress placed within the public domain. If any airspace needed for landing or taking off were included, flights which were so close to the land as to render it uninhabitable would be immune. But the United States concedes, as we have said, that *in that event there would be a taking. Thus, it is apparent that the path of glide is not the minimum safe altitude of flight within the meaning of the statute.* The Civil Aeronautics Authority has, of course, the power to prescribe air traffic rules. But Congress has defined navigable airspace only in terms of one of them—the minimum safe altitudes of flight.

"We have said that the airspace is a public highway. Yet it is obvious that if the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere. Otherwise buildings could not be erected, trees could not be planted, and even fences could not be run. The prin-

ciple is recognized when the law gives a remedy in case overhanging structures are erected on adjoining land. The landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land. See Hinman v. Pacific Air Transport, 84 F. 2d 755. The fact that he does not occupy it in a physical sense—by the erection of buildings and the like—is not material. As we have said, *the flight of airplanes, which skim the surface but do not touch it, is as much an appropriation of the use of the land as a more conventional entry upon it.* We would not doubt that, *if the United States erected an elevated railway over respondents' land at the precise altitude where its planes now fly, there would be a partial taking, even though none of the supports of the structure rested on the land.* The reason is that there would be an intrusion so immediate and direct as to substract from the owner's full enjoyment of the property and to limit his exploitation of it. While the owner does not in any physical manner occupy that stratum of airspace or make use of it in the conventional sense, he does use it in somewhat the same sense that space left between building for the purpose of light and air is used. *The superadjacent airspace at this low altitude is so close to the land that continuous invasions of it affect the use of the surface of the land itself. We think that the landowner, as an incident to his ownership, has a claim to it and that invasions of it are in the same category as invasions of the surface.*"*

---

* Under facts on all fours with the facts in the instant case, our sister states have held that an injunction will issue against a city or county which owns or operates an airport, on the ground that flights which jeopardize the health, safety or property of a landowner

Moreover, an airport is like a bridge; the County must provide, furnish and maintain suitable approaches and the owner of the airport or bridge must take sufficient land, and in cases of airports, air approaches, easements and air rights so that it will be safe for its users. Cf. *Penn Township v. Perry County*, 78 Pa. 458; *Knoll v. Harborcreek Township*, 86 Pa. Superior Ct. 423; *Beaver Borough v. Beaver Valley Railroad Company*, 217 Pa. 280, 66 A. 520; *Miller v. Beaver Falls*, supra, *United States v. Causby*, 328 U.S. 256; *Ackerman v. Port of Seattle*, 329 P. 2d 210, 349 P. 2d 664.

Even if it be conceded arguendo that the air space in question, namely, 12 feet above plaintiff's home and buildings, is a part of the public domain, it could not, *under the Constitution* and under *United States v. Causby*, be taken for public use without proper compensation. Not only is it unsafe for the planes, but it seriously jeopardizes the health and safety of plantiff and his family and guests and constitutes not only an unreasonable interference with his property, but also amounts to a nuisance.

The majority opinion clearly implies that the injury or taking was by the Airlines. While this is irrelevant in the present case since the Airlines are not parties hereto, I believe that under the facts herein this position is legally unsound and realistically impossible. None of the companies which fly the airlines nor the pilots are clothed with the power of eminent domain. They fol-

---

amount to a nuisance: *City of Phoenix v. Harlan*, 75 Ariz. 290, 255 P. 2d 609; *Brooks v. Patterson*, 159 Fla. 263, 31 So. 2d 472; *Delta Air Corporation v. Kersey*, 193 Ga. 862, 20 S.E. 2d 245.

low implicitly the law, the regulations and the orders of the Government of the United States or one of its agencies. They are, figuratively speaking, impotent slaves of the Federal Aviation Agency on their flights, their takeoffs, their paths of glide and descent paths, and their landings. Moreover, it would be realistically impossible for a property owner to prove which Airlines damaged his property and to what extent each damaged his property. It would require a property owner to sit day and night outside his home or building for weeks or months to determine which Airline did what, and to allocate the damage and the blame, and exactly what moment of the day, week, month or year it occurred. Moreover, if he or a member of his family or employee were sitting and watching outside his home, how could he or they know, even with an interspace telephone, exactly what was happening at a particular moment to the owner's wife or those inside his home, and exactly what was happening at that particular moment to the wall, ceilings, plaster and interior of his house, and which Airline caused what?

There is likewise no merit in the County's last two contentions. The fact that the Civil Aeronautics Board or other Federal Authority approved the flights in question is irrelevant and immaterial in the present case, although it may be relevant in cases where the facts are substantially different. Although we believe that the airspace in question, i.e., 12 feet above plaintiff's home, is not a part of the public domain—Federal, State, local or otherwise—even if it were, its appropriation and use for planes flying into and out of this airport at that height would amount to a "taking" of plaintiff's property. United States v. Causby and cases supra.

In *Ackerman v. Port of Seattle,* supra, the Supreme Court of Washington decided that the Airport owned by the Port of Seattle was liable in damages for a "taking" which resulted from low flights into the Airport in accordance with Federally prescribed regulations or orders. Washington has the same Constitutional provision as does the Commonwealth of Pennsylvania in regard to compensation for private property taken, injured or destroyed. That Court held specifically that flights in the normal approach area which caused fear, anxiety and apprehension constituted an unreasonable interference with plaintiff's property and amounted to a "taking" by the Port of Seattle. In the course of its opinions that Court aptly said (329 P. 2d, page 216, 221 and 348 P. 2d, page 671): ". . . if the state first declared private lands to be public domain and then built a road thereon, it is quite aparent that there would be a violation of Art. I, §16, amendment 9, of the Washington constitution. We believe this is as true with space in the air as it is with the surface of land. The government simply cannot arbitrarily declare that all of the airspace over a person's land is public domain and then, cavalierly, claim absolute immunity against property owners' claims for any and all possible damages. . . .

" '. . . under this constitutional provision, a recovery may be had in all cases where private property has sustained a substantial damage by the making and using an improvement that is public in its character; it does not require that the damage shall be caused by a trespass, or an actual physical invasion of the owner's real estate. . . .'

"This interpretation of Congress' declaration as to what constitutes public domain in the airspace is sup-

ported by the Federal government's policy of condemning and compensating for air easements over property adjoining Federal air bases. See United States v. 48.10 Acres of Land, etc., D.C. S.D. N.Y. 1956, 144 F. Supp. 567* . . . Clearly, *an adequate approach way* is as necessary a part of an airport as is the ground on which the airstrip, itself, is constructed, if the private airspace of adjacent landowners, is not to be invaded by airplanes using the airport. The taking of an approach way is thus reasonably necessary to the maintenance and operation of the airstrip."

Finally, the fact that the Civil Aeronautics Board approved the plan for the airport will not relieve the County which is the owner of the airport and the adjoining land. If there could be any doubt as to the County's liability it would unquestionably be removed by (1) well settled principles of law and (2) by United States v. Causby, supra, and (3) by the agreement entered into between the United States and the County by which the County obtained enormous federal aid for the construction of this airport. In that agreement the County specifically undertook, inter alia, the following: "(i) Insofar as is within its powers and reasonably possible, *the Sponsor will prevent the use of any land either within or outside the boundaries of the Airport in any manner* (including the construction, erection, alteration, or growth of any structure or other object thereon) *which would create a hazard to the landing, take-off or maneuv-*

* The City of Philadelphia similarly acquires by purchase or otherwise air rights over properties adjacent to its International Airport in order to comply with the Constitution of Pennsylvania and the Constitution of the United States.

ering of aircraft at the Airport, or otherwise limit the usefulness of the Airport. This objective will be accomplished either by the adoption and enforcement of a Zoning Ordinance and regulations, *or by the acquisition of easements or other interests in land or airspace,* or by both such methods."

The duty and legal obligation to acquire land, buildings, easements and other interests in land and in air space which, unless acquired, would create a hazard to the landing, take-off, paths of glide, descent paths and authorized flights of aircraft, or otherwise limit the safety, usefulness and adequacy of the Airport, was clearly and unquestionably *by the terms of this contract* that of the County of Allegheny. It follows that the County is liable to the plaintiff (1) under and by virtue of the well and long settled Common Law principle of sic utere tuo ut alienum non laedas, and (2) under the United States v. Causby case, and (3) by reason of the aforesaid contract which the County made and entered into with the United States of America.*

The viewers determined the taking of plaintiff's property as of the opening of the Airport June 1, 1952, pursuant to a prior County ordinance. The great difficulty which arises because of the complexity of the facts in this case is instantly apparent, and it is virtually a practical impossibility to fix any other date for the taking. We cannot say that the date which the Viewers found constituted a taking was erroneous. Moreover, in view of the conflicting testimony and the inherent difficulty of appraising and fixing the damage which

* Per the Administrator of Civil Aeronautics.

plaintiffs suffered, we cannot say that the Viewers erred in their verdict.

I would affirm the Orders of the lower Court.

Mr. Justice Eagen joins in this dissenting opinion.

APPENDIX A

GARDNER v. ALLEGHENY COUNTY, Appellant, 393 Pa. 120 (1958)

Appeals, Nos. 72, 73, 74, 75, and 76, March T., 1958, from order of Court of Common Pleas of Allegheny County, Oct. T., 1953, Nos. 1289, 1640, 1288, 1707, and 1706, in case of K. G. Gardner et al. v. County of Allegheny et al. Order reversed.

Equity.

Order entered dismissing preliminary objections of County of Allegheny, opinion by WEISS, J. County appealed.

Opinion

MR. JUSTICE BELL, June 3, 1958:

The County of Allegheny appealed from an order of the Court of Common Pleas of Allegheny County which dismissed the preliminary objections filed by the County to certain *new matter* in the Answer of the defendant Airlines.* A complaint in equity had been filed by the respective owners of five properties which are situate adjacent to the Greater Pittsburgh Airport in Moon and Findlay Townships, Allegheny County. In the court below, in this Court, and in all prior proceedings before this Court, the five actions were consolidated for argument and trial.

The complaint in equity of the respective property owners sought an injunction against the county and against all of the airline defendants to restrain alleg-

---

* The appeal was taken under the Act of March 5, 1925, P.L. 23, §1, 12 PS §672.

edly dangerous and illegal flights of aircraft over their respective properties. Plaintiffs averred that these flights, which number 8 every ten to fifteen minutes, and which endangered their lives and their homes, were unlawful trespasses. The owners asked as an alternative relief, that the court (a) find that the acts of the defendants constituted a "taking" and (b) award to each plaintiff the fair market value of his property. The defendants filed preliminary objections to each of these complaints; these objections were overruled by the Court below. Upon appeal, this Court decided in *Gardner v. Allegheny County,* 382 Pa. 88, 114 A. 2d 491, that on the pleadings, as they then existed, the Court below (1) was correct in overruling the preliminary objections of the defendants to that part of the complaint which sought an injunction, (2) but was in error in overruling the County's objection to plaintiffs' claim for a "taking" of their respective properties, and (3) directed the lower Court to enter a modified Decree consistent with this Court's Opinion.

The Court below thereupon entered an Order on September 30, 1955, which was subsequently amended by its Order dated March 15, 1956, the effect of which was to strike from the plaintiffs' complaint all claims for damages for a "taking", leaving only a claim for injunctive relief and for damages for trespass. The lower Court wisely permitted the defendants to file Answers including new matter.

The airlines in paragraph 19a of their Answers averred the following new matter:

"19a. The County of Allegheny, one of the defendants, has constructed and maintains the Greater Pitts-

burgh Airport in Moon Township, Allegheny County, Pennsylvania, as a public improvement, pursuant to statutory authority to provide airport and air transport facilities for the use of the public. To enable the public to have facilities for air transport of passengers and cargo, which facilities are essential for the functioning of the airport, it is necessary that airplanes *enter and leave** the airport by passing *through the air space above the plaintiffs' property below 500 feet.* Allegheny County has entered into a lease with each of the airline defendants granting to them for certain considerations the right to ingress and egress to and from the said airport.

"As a direct and necessary consequence of the construction and operation of the airport by the said County, the said County, *under its right of eminent domain,* has appropriated for public use, *aviation easements* for the flight of planes through the air space over the plaintiffs' property to the extent necessary to enable them to enter and leave the airport. The airline defendants aver that their planes pass through the air space over the plaintiffs' property only to the extent necessary to enter and leave the airport and in the exercise of their right to use the aviation easements which the County has appropriated. Wherefore, the airline defendants deny the right of the plaintiffs to enjoin their use of the aviation easements appropriated for public use by the County of Allegheny."

Defendants further averred that "all of the flights of aircraft in and out of the Greater Pittsburgh Airport have been in accordance with the regulations issued by

---

* Italics throughout ours.

the Civil Aeronautics Administration [Board] . . . and are never lower than necessary for safe landing and takeoff."

The County of Allegheny thereupon filed preliminary objections to paragraph 19a of the new matter in the Airlines' Answers on the ground that the allegations presented a question which this Court, in our prior decision, had decided was not within the jurisdiction of a Court of Equity.

This appeal, which is based upon new facts, raises new questions which were not before this Court, as well as questions which were not definitely decided by this Court in *Gardner v. Allegheny County*, 382 Pa., supra. The lower Court interpreted our prior decision as prohibiting a Court of Equity from making an award of damages for a "taking", but did not prohibit the Court of Equity *from determining* that there had been a "taking", and did not prohibit a Court of Equity from awarding damages for trespasses.* The County of Allegheny, on the other hand, contends that a Court of Equity—for technical, legal and practical reasons—should not be entitled to determine the question of whether there had been a "taking", and then leave to a board of viewers merely the question of assessing the damages.

Novel, intricate and difficult questions are raised by this appeal. Each party has presented technical, as well as practical, reasons why their position should

---

* It is obvious that a Court of Equity could award damages for trespasses only if, and after it found that plaintiffs were entitled to equitable relief, because of the danger to the lives or properties of plaintiffs.

be sustained. We believe it would aid a solution of these problems if we pointed out what was and what was not decided by this Court in *Gardner v. Allegheny County*, 382 Pa., supra. It must be recalled that this case, as well as the prior case, arose upon preliminary objections to pleadings, which of course admitted all averments of fact made in the complaints in the prior cases and in the Answer in the present case: *DeJoseph v. Zambelli*, 392 Pa. 24, 139 A. 2d 644; *Eways v. Reading Parking Authority*, 385 Pa. 592, 124 A. 2d 92; *Gardner v. Allegheny County*, 382 Pa., supra.

In our prior decision in 382 Pa., this Court held, inter alia: (1) A Court of Equity has jurisdiction to enjoin repeated trespasses in the air which endanger the lives and homes of complainants, as well as trespasses on the land of a property owner, and likewise to enjoin a nuisance. (2) A Court of Equity has jurisdiction to enjoin continuing flights of aircraft over a landowner's property at heights which are below the minimum safe altitudes of flight. Whether a Court of Equity has jurisdiction to enjoin aircraft flights which are within the air space necessary for safe takeoffs or landings if such flights imminently endanger a property owner's life or property, was not decided. (3) Flights of aircraft over privately owned land which are so low and so frequent as to be a direct and immediate interference with the use and enjoyment of the land amount to a "taking" of the land or, depending on the facts, may amount to a trespass or a nuisance. Even though only an "easement" of flight was taken, that easement, if permanent and not merely temporary, would normally be the equivalent of a fee simple interest. (4) The Act of May 2, 1929, P. L. 1278, which

was reenacted in the Second Class County Code, specifically directs the appointment of viewers to ascertain, determine and assess damages in any condemnation proceeding when compensation cannot be agreed upon. (5) A Court of Equity has no jurisdiction to assess damages for a "taking" of land.*

On the question of eminent domain, which was so vigorously argued in the present appeal, this Court said in 382 Pa.:

"Nevertheless, a Court of Equity has no power or jurisdiction to assess damages for a 'taking'. The condemnation of property for airdromes and landing fields is authorized by the Act of May 2, 1929, P. L. 1278, Art. V, §496, since reenacted in the Second Class County Code, 16 PS 2151-2401 et seq. Section 2151-2403 provides: 'The procedings for the condemnation of lands under the provisions of this article [Aeronautics] and for the assessment of damages for property taken, injured or destroyed shall be conducted in the same manner as provided [by law for the condemnation of land.]'

"Art. VII, §518, of the Act of May 2, 1929, P. L. 1278, now reenacted in the Second Class County Code, 16 PS 2151-2608(a), sets forth the provisions for the condemnation of land above referred to. The section provides: 'In case the board of commissioners or a majority of them and the parties interested in the land, property or material appropriated, injured or destroyed

---

* An opinion for the Court, a concurring opinion, a separate concurring opinion, and an opinion concurring in part and dissenting in part were filed in this case, which is exceptionally unusual in this Court and was probably necessitated by the somewhat indefinite statement of facts and the novel questions of law presented.

by the county fail to agree upon the compensation to be made for the land, property or material so taken, injured or destroyed, upon petition . . . to the court of common pleas of said county, the said court shall appoint three viewers from the county board of viewers, ...

" 'The said viewers . . . having viewed the premises . . . shall hear all parties interested and their witnesses, and, . . . shall estimate, determine and assess the damages for the land, property or material taken, injured or destroyed, and to whom the same is payable, . . .': Article VII, §523.

"That Act specifically directs the appointment of viewers to ascertain, determine and assess damages in any condemnation proceeding, when compensation cannot be agreed upon. Nowhere in the Act is there any provision for a Court in Equity to fix and determine the value of plaintiffs' property. This Court, in Hastings Appeal, 374 Pa. 120, 97 A. 2d 11, said (page 125): 'A board of view is not a common law remedy; it exists only where it has been provided for by statute: see Locust Street Subway Case, supra [319 Pa.] at p. 165. In the situations for which it has been provided, it is the only available remedy: Power v. Borough of Ridgway, 149 Pa. 317, 318, 24 A. 307; and McKee v. City of Pittsburgh, 7 Pa. Superior Ct. 397, 400; . . .'. . . .

"While there is a well established general principle that once equitable jurisdiction has attached, equity can round out the whole circle of controversy and thus do complete justice between the parties: See: Wortex Mills, Inc. v. Textile Workers Union of America, 380 Pa. 3, 109 A. 2d 815, and cases cited therein; nevertheless, this principle cannot be extended and gives no

power or jurisdiction to a Court of equity to grant relief in matters in which a specific and adequate remedy or different jurisdiction is provided by statute: United Drug Co. v. Kovacs, 279 Pa. 132, 123 A. 654; Century Distilling Co. v. Continental Distilling Co., 106 F. 2d 486.

"We therefore hold that a Court of Equity has no power or jurisdiction to determine or assess damages for a 'taking' of plaintiffs' property and is consequently without jurisdiction to grant that phase of the alternative relief demanded by the plaintiffs."

While the members of this Court differed on several questions there involved, all of the Court were unanimously of the opinion that a Court of Equity could not award compensation for a "taking".

It is clear from the present pleadings that plaintiffs have been damaged, and the questions are: Who must pay for this damage, what action or actions can be brought by plaintiffs, and who are proper parties therein? The answer to these questions will depend, in the last analysis, upon the facts developed at the trial of the case. For example, the nature and extent of the trespasses; the amount of interference with plaintiffs' lives or properties; whether frequent and dangerous and unlawful flights will amount to trespasses or by their nature, character and frequency, are so permanent as to amount to a "taking"; and if a "taking", whether it be a "taking" of an easement or a fee simple—all of these questions will, in the last analysis, we repeat, depend upon the facts which are produced at the trial at law.

We are aware of the fact that the airlines have pleaded, and the county has admitted, by its prelimi-

nary objections to the new matter contained in the airlines' answer, that the county, ". . . under its right of eminent domain, has appropriated for public use, aviation easements for the flight of planes through the air space over the plaintiffs' property to the extent necessary to enable them to enter and leave the airport. . . . Allegheny County has entered into a lease with each of the airline defendants granting to them for certain [valuable] considerations the right of ingress and egress to and from the said airport . . . [and] it is necessary that airplanes enter and leave the airport by passing through the air space above the plaintiffs' property below 500 feet."

Everyone knows that it is necessary for planes *in landings and takeoffs* to pass through the air space below 500 feet. The airlines and the county have admitted for the first time that airplanes pass through the air space above the plaintiffs' properties below 500 feet in takeoffs and landings.

The parties agree that private airlines have no right of eminent domain. The County of Allegheny, pursuant to statutory authority, has appropriated for public use, under its power of eminent domain, aviation easements for the flight of planes and has constructed, operated and leased this airport. Under the present pleadings, the County of Allegheny is liable in eminent domain proceedings for damages to plaintiffs' properties—plaintiffs have the choice to bring an action of trespass, or proceedings for a "taking" against the County of Allegheny for their damages, depending upon the facts provable by plaintiffs.

We decide that the Court of Equity does not have jurisdiction under the pleadings in this case *to deter-*

mine that there was a "taking" of plaintiffs' properties, or the amount of damages resulting from a "taking" of the easement, or of the fee of the plaintiffs, as the case may be.

The Second Class County Code provides, as hereinabove set forth, that viewers shall be appointed "to determine and assess the damages for the land, property or material taken, injured or destroyed . . . ." See also: Article I, §10; Article XVI, §8 of the Pennsylvania Constitution; Amendments to the Constitution of the United States, Article V. As the County of Allegheny points out, if a Court of Equity could or would make a determination that there was a taking of an easement, this would be contrary to the spirit and, we believe, to the language of the Code and of our prior decisions and would raise new and difficult questions: Would the board of viewers be bound by such a decision or could the board make a determination that there was a "taking" of a fee simple instead of an easement, or that there was no "taking" at all? As the present Chief Justice said in *Powell Appeal,* 385 Pa. 467,* 123 A. 2d 650 (pages 471-472): "While the Act does not expressly authorize viewers to decide questions other than such as relate to land values or damages or benefits to the affected property, it is implicit that a jury of view must decide all relevant questions of law or fact before it can completely make an award of damages or assess-

---

* Where the State Highway Law of 1945 provided for the ascertainment and assessing of damages for land taken for the construction or improvement of any State Highway, but there was *no specific* authority granted to the Court of Quarter Sessions or to the board of view *to determine* whether there had been a "taking."

ment of benefits: see Case of the Germantown and Perkiomen Turnpike Road Company, 4 Rawle 191. . . . '[The viewers] were bound to dispose, in the first instance, of all the matters committed to them, whether constituted of law or of fact, subject however to review by the sessions.' "**

It is only fair and just to all parties concerned that the pending equity proceedings by plaintiffs against the County of Allegheny and the airlines should be and they are hereby stayed until the eminent domain proceedings or the actions of trespass which may be brought by the plaintiffs against some or all of the present defendants have been brought and completed, or have been waived under §2632 of the Second Class County Code and finally determined in such a proceeding. This stay of proceedings shall be without prejudice to the right of each party to subsequently file, if desired, answers, replications and other pertinent pleadings.

The Orders of the Court of Common Pleas of Allegheny County dated January 2, 1958, at October Term, 1953, Nos. 1289, 1640, 1288, 1706 and 1707 are hereby reversed, and proceedings are hereby stayed in accordance with this Opinion. Each party shall bear his, its and their respective costs in this appeal.

** Court of Quarter Sessions.

APPENDIX B

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment—Just Compensation

* * * nor shall private property be taken for public use, without just compensation. U.S.C. Const. Amdt. 5.

Fourteenth Amendment—Due Process Clause

* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * * U.S.C. Const. Amdt. 14.

Pennsylvania Constitution

"Sec. 8. Property taken, injured or destroyed by private and municipal corporations

Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured or destroyed by the construction or enlargement of their works, highways or improvements, which compensation shall be paid or secured before such taking, injury or destruction. The General Assembly is hereby prohibited from depriving any person of an appeal from any preliminary assessment of damages against any such corporation or individuals made by viewers or otherwise; and the amount of such damages in all cases of appeal shall on the demand of either party be determined by a jury according to the course of the common law." Pennsylvania Const. Article 16, Section 8.

State Courts; Appeal; Certiorari

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

. . .

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929." 28 U.S.C., Section 1257 (2), (3).

Navigable Airspace

"As used in sections 171, 174-177, and 179-184 of this title, the term 'navigable airspace' means airspace above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Authority, and such navigable airspace shall be subject to a public right of freedom of interstate and foreign air navigation in conformity with the requirements of said sections. May 20, 1926, c. 344, Section 10, 44 Stat. 574; June 23, 1938, c. 601, Section 1107 (i) (1), (8), 52 Stat. 1028." 49 U.S.C. 180.

General safety powers and duties of Board; delegation of authority to Administrator

"(a) The Board is empowered, and it shall be its duty to promote safety of flight in air commerce by prescribing and revising from time to time—

. . . (7) Air traffic rules governing the flight of, and for the navigation, protection, and identification of, aircraft, including rules as to safe altitudes of flight and rules for the prevention of collisions between aircraft, and between aircraft and land or water vehicles." . . . 49 U.S.C. 551 (a) (7).

Lawfulness of flight

"Flight in aircraft over the lands and waters of this Commonwealth is lawful, unless at such low altitude as to interfere with the then existing use to which the land or water, or the space over the land or water, is put by the owner, or unless so conducted as to be dangerous or damaging to persons or property lawfully on the land or water beneath. The landing of an aircraft on the lands or waters of another without his consent is unlawful, except in the case of a forced or emergency landing. For damage caused by a forced or emergency landing, the owner, lessee, and operator of the aircraft shall be liable, as provided in section four hundred three. (1933, May 25, P. L. 1001, Art. IV., Section 402.)" 2 Purdon's Stat. Ann., Section 1648.

Damage to persons and property on the ground

"The owner and the pilot, or either of them, of every aircraft which is operated over the lands or waters of this Commonwealth, shall be liable for injuries or dam-

age to persons or property on or over the land or water beneath, caused by the ascent, descent, or flight of aircraft, or the dropping or falling of any object therefrom, in accordance with the rules of law applicable to torts on land in this Commonwealth.

As used in this section, 'owner' shall include a person having full title to aircraft and operating it through servants, and shall also include a bona fide lessee or bailee of such aircraft, whether gratuitously or for hire; but 'owner', as used in this section, shall not include a bona fide bailor or lessor of such aircraft, whether gratuitously or for hire, or a mortgagee, conditional seller, trustee for creditors of such aircraft or other persons having a security title only, nor shall the owner of such aircraft be liable when the pilot thereof is in possession thereof as a result of theft or felonious conversion.

The person in whose name an aircraft is registered with the United States Department of Commerce shall be prima facie the owner of such aircraft within the meaning of this section. (1933, May 25, P. L. 1001, Art. IV., Section 403.)" 2 Purdon's Stat. Ann., Section 1469.

Acquisition of air rights

"In any case in which (1) it is desired to remove, lower or otherwise terminate a nonconforming structure, or use, or (2) the approach protection necessary cannot, because of constitutional limitations, be provided by airport zoning regulations under this act, or (3) it appears advisable that the necessary approach protection be provided by acquisition of property rights, rather than by airport zoning regulations, the political

subdivision within which the property or nonconforming use is located, or the political subdivision owning the airport, or served by it, may acquire by purchase, grant or condemnation, in the manner provided by the law under which political subdivisions are authorized to acquire real property for public purposes, such air right avigation easement, or other estate or interest in the property or nonconforming structure, or use in question, as may be necessary to effectuate the purpose of this act. In the case of the purchase of any property, or any easement, or estate, or interest therein, or the acquisition of the same by the power of eminent domain, the political subdivision making such purchase or exercising such power shall, in addition to the damages for the taking, injury or destruction of property, also pay the cost of the removal and relocation of any structure or any public utility, which is required to be moved to a new location. 1945, April 17, P. L. 237, Section 14." 2 Purdon's Stat. Ann., Section 1563.

Minimum safe altitudes

". . . 'Regulation 60.17. Minimum Safe Altitudes. *Except when necessary* for take-off or landing* no person shall operate an aircraft below the following altitudes:

'(a) Anywhere. An altitude which will permit, in the event of the failure of a power unit, an emergency landing without undue hazard to persons or property on the surface;

'(b) Over congested areas. Over the congested areas of cities, towns or settlements, or over an open-air assembly of persons, an altitude of *1,000 feet* above the

highest obstacle within a horizontal radius of 2,000 feet from the aircraft . . .

'(c) Over other than congested areas. An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In such event, the aircraft shall not be operated closer than 500 feet to any person, vessel, vehicle, or structure. . . .'" 14 C.F.R. Part 60, Section 60.17.

APPENDIX C

Table of Opinions In The Equity Litigation, Being The Companion Cases (all opinions are reported under the caption Gardner et al. v. County of Allegheny, Transworld Airlines, Inc. et al.)

COURT OF COMMON PLEAS, ALLEGHENY COUNTY

Date	*Citation*
September 30, 1953	unreported
January 5. 1954	unreported
April 23, 1954	unreported
May 13, 1954	unreported
September 30, 1955	unreported
March 15, 1956	unreported

SUPREME COURT OF PENNSYLVANIA

Date	*Citation*
May 23, 1955	382 Pa. 88
June 3, 1958	393 Pa. 120